No. 83-853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES R. JACKSON, individually and as administrator of the estates of Sandra A. Jackson, deceased, and Baby Boy Jackson, deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of Jerry D. Ross, Jr., deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of Jerry D. Ross, Jr., deceased,

Petitioner,

v.

COUNTY OF WILL, a municipal corporation, and ROBERT TEZAK, Will County Coroner,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, City of Joliet, Frederick Breen, L. Taylor, Robert Kuban, Lawrence Walsh, Dave Horn, Joe Speaker, William Tatro, Joe Walsh, and Larry Morris, respectfully pray that this Court deny

the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on August 23, 1983.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 715 F.2d 1200 (7th Cir. 1983) and appears in Petitioners' Appendix at pages 1a-11a. The unpublished orders of the United States District Court for the Northern District of Illinois, Eastern Division, appear in Petitioners' Appendix at pages 12a-13a.

RESPONDENTS' STATEMENT OF THE CASE

The facts material to the consideration of the questions presented in the Petition are drawn from Petitioners' Complaints. Those facts, which are merely allegations at this stage of litigation, and which must be taken as true for the purpose of ruling on Respondents' motions to dismiss Petitioners' Complaints, were set forth by the Court of Appeals as follows:

> "On November 21, 1980, at about 9:35 p.m. Jerry Ross, age 17, accompanied by Sandra Jackson, age 16, and six months pregnant, was driving on a road in Joliet, Illinois, when the car swerved off the road for unknown reasons, crashed, and burst into flames. Two minutes later a Joliet policeman, defendant Taylor, chanced on the scene. Although the car's

wheels were spinning, its lights were on, its motor was running, and it was burning, Taylor made no attempt to determine whether it was occupied and did not call an ambulance. He did call the fire department (at 9:40) and he then returned to the road and directed traffic away from the scene of the accident. Five Joliet firemen, also defendants, arrived eight minutes later. At 10:19, having put out the fire, they first noticed Ross and Jackson slumped in the front seat of the car. They made no attempt to remove or assist either one but they did call an ambulance, which arrived at 10:26. The firemen and ambulance paramedics thought Ross dead and left him in the car, but removed Sandra Jackson alive and took her to a hospital. She was admitted at 10:40 and pronounced dead, along with her fetus, at 10:55. Ross was later removed from his car by a tow-truck driver and pronounced dead by the county coroner (also a defendant) when the coroner arrived at 11:45.

The Plaintiffs (representing Ross, Jackson, and the fetus) allege that their decedents would have been saved if Taylor had aided the occupants of the burning car, or called an ambulance, or at least not directed traffic in a way that prevented other potential rescuers from saving them, or if the firemen had discovered the car was occupied before the fire was put out or at least had aided the occupants then. The coroner is a defendant in Ross's suit because he had issued a directive that no nonsupervisory personnel (such as the firemen who discovered Ross) were to touch a corpse unless someone from his office was present, and Ross may have been alive when they discovered him. The city's police and fire chiefs, and the city and county themselves, are additional defendants, but we shall not have to consider their liability separately, or decide whether a section 1983 suit can be maintained on behalf of a deceased six-month-old fetus. The complaints also contain pendent claims under state tort law but the plaintiffs concede as they

> must that if their section 1983 claims are dismissed on the pleadings the pendent claims should also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 716 (1966).

Jackson, supra, 715 F.2d at 1201-02; Petitioners' Appendix at 2a-3a.

Petitioners' reference to Respondents' "reckless" conduct set forth in their Statement of the Case requires clarification. The Court of Appeals acknowledged that Petitioners' "complaints are liberally sprinkled with words like 'recklessly' and 'knowingly' " in describing Respondents' conduct toward their decedents. *Jackson, supra*, 715 F.2d at 1202; Petitioners' Appendix at 3a. However, upon the comments made by Petitioners' counsel at oral argument, the Court of Appeals indicated that Petitioners' Complaints allege "negligence," or at the most "gross negligence" on the part of Respondents. *Id.* at 1202; Petitioners' Appendix at 4a.

Respondents moved to dismiss Petitioners' Complaints for their failure to state a claim cognizable under Section 1983. The Federal District Court denied Respondents' dismissal motions but granted leave to Respondents to take an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) of its decision. On appeal, the Court of Appeals held that Petitioners' allegations failed to state a claim under federal law since "an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth Amendment when the attempt fails because of the negligence or even gross negligence of the officers or their superiors, and the accident victim dies. *Jackson, supra*, 715 F.2d at 1206; Petitioners' Appendix at 10a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DETERMINATION THAT THE NEGLIGENT DEPRIVATION OF LIFE OR LIBERTY DOES NOT CONSTITUTE A VIOLATION OF SUBSTANTIVE DUE PROCESS IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEALS.

Petitioners have invited this Court to use the present case as a vehicle to clarify its decision in *Parratt v. Taylor*, 451 U.S. 321 (1981). Their invitation requires this Court to interpret *Parratt* as dictating that *all* negligent deprivations of life or liberty, regardless of the state remedies available to redress such deprivations, violate the Fourteenth Amendment's guarantee of substantive due process. To follow Petitioners' recommended interpretation of *Parratt* as an all-encompassing federal remedy for anyone injured by a state officer is surely the final step in transforming the Fourteenth Amendment into the "font of tort law" which this Court has repeatedly ruled the Fourteenth Amendment should not become. Thus, Petitioners' invitation to expand the body of federal tort law is one which this Court should not accept.

Parratt, which dealt with the negligent deprivation of an inmate's hobby kit, has little to do with the facts and the issues of law presented in this case. Under *Parratt*, a meaningful postdeprivation remedy under state law is sufficient to satisfy procedural due process when an individual is negligently deprived of property. *Id.* at 541. The present case has nothing to do with procedural due process or postdeprivation remedies or the loss of property. Rather, the Court of Appeals addressed the issue

of whether the negligent deprivation of life violates substantive due process, and it persuasively held that the negligent failure to rescue—like the negligent operation of a vehicle by a state officer—is not the stuff of which a federal civil rights claim is made. The reasoning and the ultimate holding of the Court of Appeals is unerringly consistent with the Supreme Court's decisions in *Paul v. Davis*, 424 U.S. 693 (1976), *Baker v. McCollan*, 443 U.S. 137 (1979), *Martinez v. California*, 444 U.S. 277 (1980), and, of course, *Parratt*.

Petitioners' assertion that "the circuits are split" on the issue of Section 1983 liability for the negligent deprivation of life is not substantiated by their citation to cases which purportedly conflict with the Court of Appeals' decision in the present case. Of the six cases cited in favor of Petitioners' contention at pages 5 and 6 of the Petition, four cases neither address nor make mention of a negligent deprivation of life as constituting a violation of substantive due process. One case, *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983), cited by Petitioners expressly states that an individual defendant "cannot be liable under section 1983 for merely negligent failure to act," and it cites the case of *Procunier v. Navarette*, 434 U.S. 555 (1978), in support of the proposition. *Clark, supra*, 710 F.2d at 9. Petitioners' citation to *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982), in which the court held that a complaint alleging gross negligence in the care and supervision of an inmate states a cause of action under Section 1983, must be questioned in light of the Ninth Circuit's recent decision in *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983), which held that even assuming that *Parratt* applies to deprivations of life or liberty, Section 1983 does not provide a cause of action for an individual who has an adequate postdeprivation remedy at state law.

Apparently as an alternative to the theory for reversal offered on page 5 of the Petition, Petitioners present a rather incongruous argument in the first paragraph of page 6 of the Petition. Petitioners first cite this Court's recent decision in *Smith v. Wade*, ... U.S. ....., 103 S.Ct. 1625 (1983), which permits an award of punitive damages for a prison guard's reckless or careless disregard or indifference to an inmate's rights or safety. The citation to *Smith*, which has nothing to do with issues of the present case, is neither explained by Petitioners nor comprehensible from the arguments presented before or after it. Then, Petitioners cite *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), so as to discuss the case "in a procedural due process context." Petitioners' oscillation between procedural and substantive due process in their Petition (and throughout the course of this litigation) demonstrates Petitioners' inability to articulate the gravamen of their Complaints against the police officers and firefighters of the City of Joliet. The issue relating to those public servants is whether they violated the decedents' rights to substantive due process by failing to rescue them from a burning car. The Court of Appeals held that the public servants' inaction—be it even negligent or grossly negligent—was not a violation of the Fourteenth Amendment. Petitioners' citation to *Logan* and reference to "procedural due process" offer nothing to demonstrate that the Court of Appeals' decision was inconsistent with controlling precedent established by this Court.

The Court of Appeals' decision follows existing case law. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982), and *Reiff v. City of Philadelphia*, 471 F.Supp. 1262 (E.D. Pa. 1979), which are cited by the Court of Appeals, and the additional cases of *Wright v. City of Ozark*, 715 F.2d 1513

(11th Cir. 1983), *Dollar v. Haralson County, Georgia*, 704 F.2d 1540 (11th Cir. 1983), and *Todd v. White Lake Township*, 554 F.Supp. 272 (E.D. Mich. 1983), amply demonstrate that federal courts will not impose civil rights liability upon governmental personnel for their failure to perform an act which is not required by law. The practical considerations of holding otherwise were set forth in an exhaustive review by the Court of Appeals and present a persuasive argument for not transforming simple tort actions into civil rights actions. Every automobile accident, every fire, and every incident in which life becomes imperiled through no fault of governmental personnel will become, if Petitioners' position is accepted, the setting for a potential civil rights action and a trial on the complaint. A plaintiff need only allege that the attending governmental personnel failed to provide adequate emergency medical treatment (or breached a duty of care under the parlance of negligence law), and that allegation alone will ensure every plaintiff victimized by an automobile accident, fire, or other calamity of a trial on the merits of his or her civil rights claim. To permit such actions in federal court for the failure to render adequate medical treatment to persons who have imperiled themselves is to truly make the Fourteenth Amendment become the "font of tort law" for which it was not designed.

II.

THE SUPREME COURT NEED NOT ADDRESS THE ISSUE OF "WHETHER THE LACK OF AN ADEQUATE STATE REMEDY AFTER A DEPRIVATION OF LIFE OR LIBERTY VIOLATES PROCEDURAL DUE PROCESS."

Petitioners request that this Court permit a review of an issue that was not addressed by the Court of Appeals. That issue involves the adequacy of any postdeprivation

remedies that Petitioners may have in seeking recourse against Respondents in state court. Petitioners assert (although it is not clear in the argument on page 7 of the Petition) that procedural due process is satisfied if a state provides an adequate postdeprivation remedy for the aggrieved individual. As has become characteristic of Petitioners' arguments, Petitioners also engage in a discussion of substantive due process and the adequacy of a postdeprivation remedy. The sum and substance of Petitioners' argument are that they do not have an adequate remedy under Illinois law, and, therefore, this Court should find a cause of action against Respondents for violating procedural due process in failing to rescue their decedents.

The need for an advisory opinion on the issue Petitioners raise in Section I.B. of their Petition has not been expressed. This Court's attention need not be given to an issue that was not addressed by the Court of Appeals. Assuming *arguendo* this Court determined the issue to merit review, it must be noted that Petitioners have failed to set forth any explanation of how their state remedies are inadequate. Petitioners have merely cited (but not in Section I.B. of their Petition) two Illinois statutes, Ill.Rev.Stat. 1981, ch. 85, par. 4-102 and par. 5-103(b), and stated that both statutes cloak Respondents with "absolute immunity" from liability.

This issue hardly merits review. Petitioners did not raise the applicability of ch. 85, par. 5-103(b), in its appellate brief to the Court of Appeals. It should not be discussed by Petitioners at this late stage in litigation. Furthermore, those statutes do not cloak Respondents with "absolute" immunity. Finally, it appears incongruous for Petitioners to request this Court to review an issue that was neither briefed nor addressed at the trial court level

or in the Court of Appeals. This case was decided on the adequacy of Petitioners' Complaints in stating a cause of action under Section 1983 and not the adequacy of their state remedies. It is the decision of the Court of Appeals that should be Petitioners' concern and not what the Court of Appeals could have decided.

III.

THE SUPREME COURT NEED NOT ADDRESS THE ISSUE OF "WHETHER RECKLESS PERFORMANCE OF GOVERNMENTAL SERVICES AFTER PERFORMANCE BEGINS VIOLATES DUE PROCESS."

Again, Petitioners request this Court to review an issue that was neither briefed nor addressed in the Court of Appeals. That new issue apparently involves Respondents' "reckless" performance of services once they discovered Petitioners' decedents in the burning car. Petitioners cite page 1205 of the reported decision of the present case where the Court of Appeals purportedly held that "a municipality can never be liable for reckless performance of governmental services after performance begins."

A word by word analysis of page 1205 fails to reveal either an express or implicit holding that "a municipality can never be liable for reckless performance of governmental services after performance begins." To find such a holding offered by Petitioners is truly an act of legal alchemy.

Petitioners' magical powers aside, the issue that Petitioners now raise in Section I.C. of their Petition was not before the Court of Appeals and does not now merit review by this Court. The purported "split in the Circuits" must wait for another day for its review by the Supreme Court.

IV.

THERE ARE NO SPECIAL OR IMPORTANT REASONS REQUIRING SUPREME COURT REVIEW OF THIS CASE.

Petitioners assert that the importance of Section 1983 case law and the divergent opinions that result thereunder provide cause for review of the decision of the Court of Appeals. The "divergent opinions" which Petitioners alleged to exist in Section I of its Petition were refuted in Respondents' brief. Petitioners' impassioned plea to this Court to "prevent the address of the courthouse from being the determinative factor" of the outcome of a civil rights case appears to be hyperbole when it is realized that "divergent opinions" on the outcome of this case do not exist. Disagreements abound in the body of federal civil rights law, but this case does not involve any of those disagreements. A constitutional mandate to rescue people from burning cars is not the kind of issue that would evoke a diversity of opinions from the judiciary. All nobility aside, the Fourteenth Amendment should not become a Good Samaritan law.

CONCLUSION

Because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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Dated: December 28, 1983